



Faculty of Laws

UNIVERSITY COLLEGE LONDON

BENTHAM HOUSE ENDSLEIGH GARDENS LONDON WC1H 0EG

Tel: 020 7679 2000 Fax: 020 7387 9597

18 November 2002

Dear Mr Burton,

Thank you for your letter of 12 November 2002. I have considered the arguments put forward by and on behalf of the Embassy of Saudi Arabia in support of their claim that records in possession of three firms of lobbyists retained to work for them are entitled to be regarded as 'archives and documents of the mission'. I am assuming that the relations between the three firms and the Saudi Embassy are based on a contract for professional services between one of the three firms, Qorvis Communications, and the Kingdom of Saudi Arabia. The other two firms are in contractual relations with Qorvis Communications and not with Saudi Arabia or with the Ambassador. On that basis it is my opinion that the records which are the subject of subpoenas from the Committee on Government Reform of the House of Representatives are not archives or documents of the Saudi mission and so not protected on the basis of inviolability from disclosure.

I will respond to your questions in order:-

1. Article 24 of the Vienna Convention on Diplomatic Relations reflects pre-existing customary international law, but also goes beyond it. It establishes, for example, that archives not situated on mission premises are entitled to inviolability. Nor do the archives of the mission (unlike the diplomatic bag) require to be identified by visible official marks indicating their character.

Subsequent practice has given a wide construction to the term 'archives and documents' by including modern methods of storage of information. The 1963 Vienna Convention on Consular Relations states that 'consular archives' includes all the papers, documents, correspondence, books, films, tapes and registers of the consular post, together with the ciphers and codes, the card-indexes and any article of furniture intended for their protection or safekeeping. This wide description has always been regarded as applicable to the 1961 Vienna Diplomatic Convention, particularly since the immunities accorded to diplomatic missions are generally wider than those accorded to consular posts.

To be entitled to inviolability, however, archives and documents must be 'of' the mission. The test generally applied is that they must belong to or be in the possession

15-NOV-2002 10:30 OCE LAMS FACULTY 02016171400 P.03

of the mission. It may be noted that at the Vienna Conference, the United States proposed, and later withdrew an amendment which would have defined archives as

'the official records and reference collections belonging to or in the possession of the mission'

Although the first part of this amendment is clearly too narrow, the second part of the proposed definition: 'belonging to or in the possession of the mission' has been confirmed by subsequent practice. These or very similar words appear in a number of agreements conferring privileges and immunities on international organisations where the context suggests that they were intended to be declaratory of the meaning of Article 24 of the Vienna Convention on Diplomatic Relations.

The relevance of the test of ownership or possession to protection as 'archives and documents' was explored very thoroughly by English courts in 1987 in the context of the collapse of the International Tin Council (ITC). The ITC archives were entitled under international agreement, given effect in United Kingdom domestic law, to the same inviolability as was accorded to the official archives of a diplomatic mission. The ITC intervened in the case of *Shearson Lehman Brother Inc. and Another v. Maclaine Watson & Co. Ltd. and Another* seeking to claim inviolability for documents originating in the ITC but which had found their way into the hands of third parties. You will find the successive judgments of the English High Court, the Court of Appeal and the House of Lords conveniently together in 77 International Law Reports, beginning at p. 107.

At first instance, Webster, J, accepted (p. 122) that if a document was deliberately sent to a third party 'its archival character and its inviolability are lost'. On appeal, Dillon, LJ, maintained (p. 130) that documents in the hands of independent experts consulted by the International Tin Council ceased to be archives of the organisation. When the case reached the House of Lords, the Tin Council conceded that inviolability could not arise 'with respect of any documents held by third parties on loan from the ITC or otherwise as bailees or agents for the ITC' (p. 152). Lord Bridge held (p. 155) that 'a document communicated to a third party by an officer or employee of the ITC with actual authority, express or implied, or with ostensible authority, no longer belongs to the ITC and hence no longer enjoys inviolability as part of the official archives.' The House of Lords judgment, given the agreement and legislation which was in issue, is of equal application to archives of a diplomatic mission. It was a unanimous judgment, and I believe that it would be a persuasive authority in United States courts.

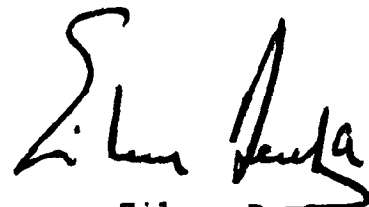
2. The case of *In re Liberian Eastern Timber Corporation v. The Government of the Republic of Liberia* is not authority for the argument that documents sent with authority to a third party for the purposes of obtaining

professional advice remain 'archives and documents of the mission'. It relates to the entirely separate question of whether embassy bank accounts are immune from attachment or execution. The Vienna Convention on Diplomatic Relations gives inviolability to property of a diplomatic mission (other than archives, which are treated separately) only where it is on the premises of the mission. There have been a series of cases in several jurisdictions, this case being one of them, which now establish that embassy bank accounts are entitled to protection under customary international law. The case cannot be used in order to enlarge the protection given under a different Article of the Vienna Convention where the wider construction cannot be supported either by the words of the Convention, by practice, or by authorities in other jurisdictions.

3. Lobbyists and public relations specialists providing professional services to the Embassy of Saudi Arabia would not on that basis be exempt from an obligation to testify as witnesses. The only persons entitled to exemption from the duty to testify are diplomatic agents notified and accepted as such, as well as other members of the mission entitled under the terms of Articles 37 and 38 of the Vienna Convention on Diplomatic Relations. Beyond those categories, employees and agents of the Kingdom of Saudi Arabia might be able to assert a claim of sovereign immunity if asked to give evidence on official matters. This is a more difficult area, but I understand that the persons concerned are in fact independent contractors rather than officials or agents of Saudi Arabia.

For completeness I should add that I have considered whether the documents sought might be entitled to inviolability as 'official correspondence of the mission' under Article 27.2 of the Vienna Convention on Diplomatic Relations. There is virtually no practice establishing the extent of protection given under Article 27.2 of the Convention, for reasons which I set out in my commentary on the provision (*Diplomatic Law*, 2nd ed. pp. 183 - 184). In my view, however, correspondence to a third party not being an employee of the sending State is not entitled to inviolability once it has been received and become the property of the recipient.

*Yours sincerely,*



Eileen Denza

Visiting Professor of Law

Dan Burton  
Chairman, Committee on Government Reform  
House of Representatives  
Congress of the United States